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IS THE HIPAA BEAST COMING TO YOUR SCHOOL DISTRICT?*

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Editor's Note: This is the first installment of a two-part series on the effect of HIPAA on public schools. The authors first address how to determine if HIPAA applies to school districts. In the second part, to appear in the January 2003 issue, the authors outline what covered school districts must do to comply.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) received public fanfare at the time of its enactment because it made it easier for employees to continue health care insurance with minimal disruption when changing employers, thus enhancing the portability of health insurance. However, HIPAA also includes many other significant provisions, including some aimed at nationalizing claims procedures and an authorization for the Secretary of Health and Human Service (HHS) to establish standards for protecting the privacy of personal health information (PHI). HHS has thus far issued two sets of final regulations (known as the Privacy Rule) setting these standards, the first in December 2000[1] and the second in August 2002.[2] Because the compliance date, April 14, 2003, is quickly approaching, many school districts are beginning to consider whether these HIPAA regulations apply to them and if they need to take steps to comply with this complex set of regulatory requirements.

This article attempts to explain the HIPAA privacy rules generally and their possible application to public schools. The reader should keep in mind that HIPAA contains an incredible number of exceptions not discussed here. Also, many of the regulations are susceptible to differing interpretations by reasonable minds. In fact, some attorneys believe that HIPAA does not apply to school districts at all. We disagree for the reasons discussed below. This much is certain: school districts face a huge task in trying to tame this HIPAA beast.

ARE SCHOOL DISTRICTS COVERED?

To determine the extent to which they are covered by the HIPAA privacy rules, school districts must conduct a "HIPAA audit." Through such an audit, school entities will be able to determine: (1) the degree to which its policies and practices are governed by the HIPAA rules; and (2) what changes need to be made to comply. Determining whether HIPAA applies is important because failure to comply with HIPAA

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ABOUT THE NSBA COUNCIL OF SCHOOL ATTORNEYS

Formed in 1967, the NSBA Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

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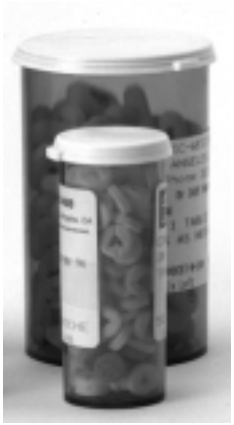
has significant consequences, including civil and criminal sanctions. A person who knowingly "obtains individually identifiable health information relating to an individual or discloses individually identifiable health information to another person" in violation of HIPAA could be fined up to $2,500 and/or imprisoned for up to ten years. 42 U.S.C. § 1320d-6. The rest of this article outlines the questions to ask in a HIPAA audit to determine coverage.

The HIPAA Privacy Rule may affect public school entities in two ways—first, they may have to deal with HIPAA "covered entities" and second, they may themselves be health plans or health care providers "covered" by HIPAA. Public schools that need health information about their employees and students may find that health care providers who previously supplied districts with health care reports and information about students or staff may be more reluctant to disclose such information. It may be more difficult, for example, for public schools to obtain reports from physicians treating employees injured on the job and seeking workers' compensation benefits. Reports under the Family and Medical Leave Act will likely be slower in coming. Reports by outside school psychologists may be more difficult to obtain. Indeed, some health care insurers are already telling school districts that they will not disclose as much health information as before, making it more difficult for school districts to control and budget for health care costs.



Besides dealing with health plans and health care providers covered by the HIPAA Privacy Rule, a public school entity may itself be a "health plan" and/or a "health care provider" for HIPAA purposes. If a public school entity is a "health plan" or "health care provider," then it will be subject to the same duties and responsibilities as other health plans or providers. As a health plan or provider, a public school entity must become familiar with concepts such as "hybrid entities," "business associates," "de-identification," "plan sponsor," and the "transaction rule." School districts already familiar with the confidentiality rules under the Family Educational Rights and Privacy Act (FERPA) will now have to expand their policies and practices to include HIPAA rules, if appropriate. Because the HIPAA Privacy Rule is not intended to govern "employers" or the employment relationship, a school district's obligations as an "employer" to keep medical records of its "employees" confidential under the Americans with Disabilities Act will be distinct from a district's duty to keep health records private as a "health plan" or a "health care provider." Clearly, public schools must exercise great care to keep from tripping over the many privacy rules with which they must comply.

WHEN IS A PUBLIC SCHOOL ENTITY A "HEALTH PLAN?"

The term "health plan" is broadly defined as "an individual or group plan that provides, or pays the cost of, medical care." 45 C.F.R. § 160.103. Seventeen separate types of entities, including "group health plans," health insurance issuers, HMOs, the Medicare Program, or an issuer of a Medicare supplemental policy are identified as fitting this definition. 45 C.F.R. §160.103. Although not absolutely clear, a public school entity, as an employer, that does nothing more than pay premiums to a health care insurer may not be a "health plan" but would be a "sponsor" of the "health plan."

A school district insured for hospitalization and physician services may still have to follow the HIPAA Privacy Rule if it self-insures for dental, vision, and/or prescription services. By self-insuring for these programs, the public school entity becomes a "health plan" for HIPAA purposes. Similarly, use of Section 125 plans or "flexible spending accounts" might also trigger HIPAA applicability if there is a health care component to the plans. Such plans will have to comply fully with the HIPAA Privacy Rule.

The HIPAA Privacy Rule does not appear to exempt government employers that operate a health plan. Therefore, under the broad definition of "health plan," the Privacy Rule would apply to health plans operated or managed by a public school entity. However, this definition, upon closer examination, raises a number of questions. For example, it includes "individual" plans, but nowhere defines that term. Nor do the regulations define "plan" or "group plan." The regulations do specifically state that "group health

plans" are "health plans." 45 C.F.R. § 160.103. The phrase "group health plan" is defined as follows:

> Group health plan (also see definition of health plan in this section) means an employee welfare benefit plan (as defined in section 3(1) of the Employee Retirement Income and Security Act of 1974 (ERISA), 29 U.S.C. 1002(1)), including insured and self-insured plans, to the extent that the plan provides medical care (as defined in section 2791(a)(2) of the Public Health Service Act (PHS Act), 42 U.S.C. 300gg-91(a)(2)), including items and services paid for as medical care, to employees or their dependents directly or through insurance, reimbursement, or otherwise, that:
>
> 1. Has 50 or more participants (as defined in section 3(7) of ERISA, 29 U.S.C. 1002(7)); or
> 2. Is administered by an entity other than the employer that established and maintains the plan.

45 C.F.R. §160.103.

ERISA defines the term "employee welfare benefit plan" as follows:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions." 29 U.S.C. § 1002(1).

These specific definitions pertaining to employer plans suggest that the only employer health plans covered are plans that meet each of the conditions set forth. If that is true, to be covered a health plan operated by a public school entity to cover its employees would have to be an "employee welfare plan," covering 50 or more participants or administered by an entity other than the employer. 45 C.F.R. §160.103. This would appear to exclude a self-administered plan covering fewer than 50 participants. Thus, the broad definition of "health plan" that seemingly covers all employer health plans may have a narrower scope than first apparent.

The regulatory verbiage raises other questions. What does the term "administered" mean? What does the phrase "administered by an entity other than the employer" mean? Does the term include administration of the plan only, or does it include the administration of claims, or both? Does the entity other than the employer have to fully and completely administer the plan, or is administration of only a part of the plan sufficient for purposes of the definition of the term "group health plan?" If a public school entity, as the employer, hires a third party administrator (TPA) to administer claims for a program with less than 50 participants, is the program a "group health plan?" Under ERISA an employer includes "any person acting. . .indirectly, in the interests of the employer." 29 U.S.C. § 1002(5).

As abstruse as this analysis may seem, even more intricate is the argument that because ERISA generally does not apply to government plans, see, 29 U.S.C. § 1003(b)(1), 29 U.S.C. § 1002(32), then the definition of "group health plan" cannot possibly encompass a public school plan organized for school district employees and dependents because the definition of "employee welfare benefit plan" is not applicable to public school entities under ERISA.

The weight of regulatory provisions overwhelmingly supports the notion that self-insured health plans operated or maintained by public school entities are covered "health plans" for purposes of the HIPAA Privacy Rule. First, the fundamental definition of the term "health plan" is quite broad. Second, "applicability" provisions in the HIPAA Privacy Rule do not indicate health plans operated or maintained by public school entities are exempt. See 45 C.F.R. §§ 160.102; 160.201; 160.300; 164.104; 164. 500. Third, in the definition of the term "health plan," seventeen examples of covered health plans are described and defined, including: "[a]ny other individual or group plan, or combination of individual or group plans, that provides or pays for the cost of medical care . . ." 45 C.F.R. § 160.103. This would seem to include any self-insured health plan operated by a public school entity.

Many public school entities are part of self-funded health care consortia or participate in self-funded health care trusts. Such self-funded plans will have to ensure that they are properly structured and that their relationships with participating school districts are properly documented to meet various HIPAA requirements. Such health consortia and trusts should decide whether to structure themselves as the health plan or as a "business associate" for participating school districts, who would then be the health plans. There are pros and cons to either approach.[3]

WHEN IS A PUBLIC SCHOOL ENTITY A "PLAN SPONSOR?"

The HIPAA Privacy Rule may still affect public school entities fully insured for all aspects of health care if they are "plan sponsors." However, the applicable regulations do not make clear that a public school entity that pays health care insurance premiums is necessarily a "plan sponsor." Nevertheless, some health insurers are advising public schools that the districts are "plan sponsors" under HIPAA. As "plan sponsors," public school entities may no longer have access to all of the information from their health insurer that they previously accessed routinely. This is because the HIPAA Privacy Rule requires any "group health plan" to ensure that its plan documents "restrict use and disclosures of such information by the plan sponsor consistent with the requirements of " the Privacy Rule. 45 C.F.R. § 164.504(f)(1)(i).

WHEN IS A PUBLIC SCHOOL ENTITY A "HEALTH CARE PROVIDER?"

Like the term "health plan," the term "health care provider" is broadly defined to

include any "provider of services (as defined in Section 1861(u) of the Act, 42 U.S.C. 1395x(u)4), a provider of medical or health services (as defined in section 1861 of the Act, 42 U.S.C. 1395x(s)5), and any other person or organization who furnishes, bills, or is paid for health care in the normal course." 45 C.F.R. § 160.103. The term "health care," in turn, is broadly defined as:

> care, services, or supplies related to the health of an individual. Health care includes, but is not limited to, the following: (1) preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and (2) sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.

45 C.F.R. § 160.103.

Clearly, school entities that provide special education almost certainly are providing "health care" as defined in the HIPAA regulations. When "related services" required under a student's individualized education plan (IEP) involve such things as occupational therapy, physical therapy or psychological counseling, for example, health care is being provided. A school district might also be deemed a health care provider if it employs a school nurse, school psychologist or athletic trainer. An on site school based health clinic might also make a school district a health care provider depending on the relationship between the clinic and the district. However, a public school entity that provides health care is not a "covered" health care provider under HIPAA unless it also transmits the health information[6] in electronic form in connection with a transaction covered by HIPAA. It does not matter whether the transmission is sent directly by the school entity or indirectly by contracting with another entity to transmit the data. In addition, there are increasing numbers of federal and state funding programs from which school districts can access additional funding in payment for "related services."

CONCLUSION

If a school district is a health plan or health care provider covered by HIPAA, it must comply with the privacy standards. (Please see the box below for general HIPAA requirements.) Issues related to compliance with HIPAA standards will be discussed in more detail in the second part of this series appearing in the next issue of *Inquiry & Analysis*.

HIPAA REQUIREMENTS

HIPAA's national standards to protect an individual's medical records and other personal health information, gives patients more control over their health information by limiting the use and disclosure of health records. Generally, most "health plans" and "health care providers" will have to:

- Provide information to patients about their privacy rights and how their information will be used;
- Adopt and implement clear privacy procedures;
- Train employees to understand and follow the privacy procedures;
- Designate individuals responsible for ensuring the adoption and implementation of the privacy procedures and complaint processes; and
- Secure patient records containing individually identifiable health information so they are accessible only by those who require them to carry out their duties.

[1] 65 Fed. Reg. 82462 (Dec. 28, 2000).

[2] 67 Fed. Reg. 53182 (Aug. 14, 2002).

[3] We believe that an employer that simply pays premiums to health insurance issuers or HMO'S is not a "health plan" as defined in HIPAA. However, there are some who disagree and believe that an employer actually meets the definition of a "group health plan" if the employer is fully insured and has fifty (50) or more employees. We disagree.

[4] The term "provider of services" means a hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or for purposes of Section 1395f(g) and Section 1395n(e) of this title, a fund. 42 U.S.C. §1395x(u).

[5] The term "medical and other health services" means any of the following items or services: (1) physicians' services; (2) * * * (C) diagnostic services which are– (D) outpatient physical therapy services and outpatient occupational therapy services; * * * (M) qualified psychologist services; and (N) clinical social worker services (as defined in subsection (hh)(2) of this section); * * *. 42 U.S.C. §1395x(s).

[6] Information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual. 45 C.F.R. §160.103.